Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

DONALD REYES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Fourth Amendment of the United States Constitution clearly requires that a search of an individual's property may be performed only upon the issuance of a warrant based on probable cause. The Second Circuit in this case, by rejecting a defense recognized in other Circuit Courts of Appeals, held that any search of a probationer's property by law enforcement officials may be performed without a warrant based on probable cause, despite the probationer's lack of consent to such a search.

The precise issue presented for review by this court is as follows:

Whether law enforcement officials may elicit probation officers to search a probationer's home at the direction of, in the presence of, and with the participation of law enforcement officials when law enforcement officials lack probable cause sufficient to obtain a warrant, and the probationer has not consented to searches by law enforcement as a condition of his supervision by probation.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cited Authorities	iii
Table of Appendices	vi
Opinions Below	1
Statement of Jurisdiction	1
Constitutional Provision Involved	1
Statement of the Case	2
Reasons for Granting the Writ	6
I. The Decision of the Second Circuit Conflicts with the Holdings of Other Courts of Appeals	7
II. The Decision of the Second Circuit Court of Appeals in This Case Limits the Warrant Requirement of the Fourth Amendment, and Therefore Requires Review By This Court.	10
Conclusion	12

TABLE OF CITED AUTHORITIES

Page

Cases:

Knights v. United States, 534 U.S. 112, 122 S. Ct. 5887, 151 L. Ed. 2d 497 (2001) 10

Smith v. Rhay, 419 F.2d 160 (9th Cir. 1969) 7, 8, 11

United States v. Cardona, 903 F.2d 60 (1st Cir. 1990), *cert. denied*, 498 U.S. 1049, 111 S. Ct. 758, 112 L. Ed. 2d 778 (1991) 8, 11

United States v. Giannetta, 909 F.2d 571 (1st Cir. 1990) 8

United States v. Hill, 967 F.2d 902 (3d Cir. 1992) ... 9

United States v. Jarrad, 754 F.2d 1451 (9th Cir. 1985), *cert. denied*, 477 U.S. 839, 106 S. Ct. 96, 88 L. Ed. 2d 78 (1985) 8

United States v. Martin, 25 F.3d 293 (6th Cir. 1994) 9

United States v. McCarty, 82 F.3d 943 (10th Cir. 1996), *cert. denied*, 519 U.S. 903, 117 S. Ct. 257, 136 L. Ed. 183 (1996) 9

United States v. McFarland, 116 F.3d 316 (8th Cir. 1997), *cert. denied*, 522 U.S. 961, 118 S. Ct. 394, 139 L. Ed. 308 (1997) 9

Cited Authorities

Page

United States v. Richardson, 849 F.2d 439 (9th Cir.), *cert. denied*, 488 U.S. 866, 109 S. Ct. 171, 102 L. Ed. 2d 141 (1988) 8

United States v. Thomas, 729 F.2d 120 (2d Cir. 1984), *cert. denied*, 469 U.S. 846, 105 S. Ct. 158, 83 L. Ed. 2d 95 (1984) 3

United States v. Watts, 67 F.3d 790 (9th Cir. 1995), *rev'd on other grounds*, 519 U.S. 148, 117 S. Ct. 633, 136 L. Ed. 2d 554 (1997) 8

Wilson v. United States, 959 F.2d 12 (2d Cir. 1992) 3

United States Constitution:

U.S. Const. Amend. IV ..... *passim*

Statutes:

18 U.S.C. § 3231 2

21 U.S.C. § 841(a)(1) 2, 3, 6

21 U.S.C. § 841(b)(1)(C) 6

21 U.S.C. § 846 3

28 U.S.C. § 1254(1) 1

Cited Authorities

Page

Rule:

Fed. R. App. P. 3(a)(1) 2

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Second Circuit Dated And Decided March 7, 2002 ..... 1a

Appendix B — Excerpts From Transcript Of Suppression Hearing Dated October 2, 2000 ... 50a

Appendix C — Excerpts From Transcript Of Sentencing Hearing Dated January 30, 2001 ... 54a

Appendix D — Excerpts From Conditions Of Probation And Supervised Release Dated May 12, 1998 ..... 58a

OPINIONS BELOW

The United States District Court of the Northern District of New York (McAvoy, CJ.) denied petitioner's suppression motion in open court on October 2, 2000 and clarified its decision on January 30, 2001. A transcript of the October 2, 2000 decision is reproduced beginning at 50a in the appendix annexed hereto. The January 30, 2001 continuation and clarification of the decision is contained in the appendix 54a. The United States Court of Appeals for the Second Circuit affirmed the decision of the District Court (Cabranes, J. joined by Feinberg and Jacobs, JJ), and the decision in that case is reported at 283 F.3d 446 (2001). A copy of that decision is contained in the appendix annexed hereto at 1a.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Second Circuit was rendered on March 7, 2002. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision governing this case is the Fourth Amendment of the United States Constitution, which states as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation,

> and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

STATEMENT OF THE CASE

This criminal proceeding was brought before the United States District Court, Northern District of New York (McAvoy, CJ), pursuant to that court's jurisdiction as set out in 18 U.S.C. § 3231. Upon motion of the petitioner, the District Court denied the suppression of evidence found by law enforcement officers on petitioner Donald Reyes's property during a warrantless search. A transcript of the oral ruling of the District Court is contained at 50a and 54a of the appendix herein. The petitioner subsequently pled guilty to one count of manufacturing marijuana in violation of 21 U.S.C. § 841(a)(1) (Court of Appeals docket number 01-1110) and, separately, for violations of the conditions of his supervised release (Court of Appeals docket number 01-1099), specifically reserving the right to appeal the District Court's ruling on his suppression motion, as it related to both convictions.

The United States Court of Appeals for the Second Circuit acquired jurisdiction over this matter by the petitioner's timely filing of a notice of appeal pursuant to Federal Rule of Appellate Procedure 3(a)(1). The two criminal matters were consolidated by the Court of Appeals, and a decision rendered thereunder. The Court of Appeals held that the warrantless search of petitioner's property was constitutional under the facts outlined below.

Petitioner Donald Reyes was, at all times relevant herein, subject to certain conditions that governed his post-release supervisory period following a 1998 conviction, pursuant to 21 U.S.C. §§ 846 and 841(a)(1), and his resulting incarceration.[1] A reproduction of those conditions is contained at 58a of the appendix. The condition at issue herein stated that ". . . the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer".

Prior to July 10, 2000, the Federal Drug Enforcement Administration (hereafter "DEA"), through Special Agent Alan Abrams, developed information that one Steven Posniewski was actively engaged in the cultivation and sale of marijuana from his home in Troy, New York. Based upon the information developed by the DEA, Agent Abrams obtained a warrant for the search of Mr. Posniewski's residence from a New York State court judge. At or about the same time, and prior to execution of the Posniewski warrant, Agent Abrams claims to have developed information indicating that petitioner, Donald Reyes, who lived next door

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1. Since federal parole was abolished as of 1987, federal probation officers have been given the duty of supervising individuals subjected to supervision following a term of incarceration. *See Wilson v. United States*, 959 F.2d 12, 15 (2d Cir. 1992). As a result, the existing law as it refers to individuals on probation or parole applies also to those supervised by probation, the substitution for federal parole, such as petitioner Reyes. *See United States v. Thomas*, 729 F.2d 120 n.1 (2d Cir. 1984) (stating that "[i]n general, courts have treated parolees and probationers alike in the Fourth Amendment context"), *cert. denied*, 469 U.S. 846, 105 S. Ct. 158, 83 L. Ed. 2d 95 (1984). Therefore, for clarity and ease in the presentation of argument in this petition, petitioner Reyes will be referred to as "probationer" herein.

to Posniewski, was also engaged in growing marijuana. However, Agent Abrams testified at petitioner's suppression hearing that he had not developed information sufficient to seek and obtain a search warrant of Mr. Reyes' property.

Approximately one week prior to the execution of the Posniewski warrant, Agent Abrams contacted United States Federal Probation in Albany, New York and, in particular, John Watts, a supervisory probation officer. Agent Abrams requested that Mr. Watts assist him and engage in a home visit of petitioner Reyes's home at the same time that the Posniewski search warrant was executed. Probation Officer John Watts, who otherwise acknowledges that Mr. Reyes was in full compliance with his supervised release guidelines, considered the proposal and ultimately agreed.

The DEA had developed a task force, using both federal and local law enforcement agents, to investigate possible drug activity by individuals in the Troy, New York area. The DEA, according to its own admission, did not have probable cause to secure a search warrant to search petitioner's property. On July 10, 2000, the DEA task force consisting of a total of fifteen (15) police officers, and which included several DEA agents, officers of the Troy Police Department, New York State Parole Officers and New York State Police, assembled within the building which housed the Troy, New York Police Department. Also included in this group were John Watts and petitioner's probation officer, Merry Jill Blomquist. DEA Agent Abrams ran the task force and the briefing that was done that morning, and the officers were divided into groups for purposes of operations at both the Posniewski and Reyes properties. Following the meeting, probation officers John Watts and Mary Jill Blomquist were assembled with DEA

task force members, under the supervision and direction of the DEA, at the end of the street on which both petitioner and Steven Posniewski lived. According to the suppression hearing testimony of federal probation supervisor John Watts, the probation officers waited with members of the DEA task force at the end of the street while other members of the task force executed the warrant on the Posniewski property. Probation officers John Watts and Mary Jill Blomquist waited for, and received, a telephone call from members of the DEA task force executing the Posniewski warrant directing them to begin their home visit with petitioner Donald Reyes. A member of the DEA task force, New York State Parole Officer Michael Smith, who had no supervisory or other authority over petitioner Reyes whatsoever, and served on the DEA task force as a law enforcement officer, accompanied probation officers Watts and Blomquist on the home visit of Donald Reyes.

DEA task force members, all law enforcement officers, remained in the area surrounding petitioner Reyes's home while probation officers Watts and Blomquist, and DEA task force member Officer Smith, began the Reyes home visit. When the two probation officers and DEA task force agent Smith attempted the home visit, they initially received no answer at the home. Upon receiving no answer, DEA task force member Smith then traveled, alone, into the back yard area of petitioner Reyes's home. While approaching a wooded area on petitioner's property, DEA task force member Smith found pots of cultivated marijuana. Task force member Smith then alerted probation officers Watts and Blomquist of his finding. Following this finding, petitioner Reyes answered his door and permitted probation officers Watts and Blomquist to enter his home in accordance with the "home visit" condition of his supervised release. Petitioner Reyes

specifically excluded Officer Smith, and all other DEA task force members in the vicinity. The probation officers then interviewed petitioner Reyes and, during their visit, the probation officers found no marijuana or other evidence of marijuana cultivation in plain view. Following that fruitless visit, probation officer Watts testified at the suppression hearing that he then spoke to DEA Agent Abrams. Agent Abrams then informed petitioner Reyes that marijuana plants had been found outside petitioner's home, gained petitioner Reyes's consent to enter his home and eventually convinced Donald Reyes, based on the marijuana found outside by DEA task member Smith, to produce any marijuana that was within his home. Petitioner Reyes then directed Agent Abrams to marijuana plants and a cultivation room located in his residence. Subsequently, petitioner was indicted for intentionally manufacturing more that fifty marijuana plants in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C).

Petitioner sought the suppression of the plants found outside of his home by Officer Smith, a member of the DEA task force. The United States stipulated that if those plants were suppressed, the plants discovered by the DEA inside of the home would necessarily also be suppressed. The United States District Court (McAvoy, CJ) denied petitioner's suppression motion, and the Court of Appeals for the Second Circuit affirmed.

REASONS FOR GRANTING THE WRIT

The petition should be granted for two reasons. First, the Second Circuit's decision is in direct conflict with the law of other Circuit Courts of Appeals that recognize a defense to the use of evidence seized in connection with a search in which probation officers work in concert with, and upon prior request

of, law enforcement agents who do not have probable cause to secure a warrant. Second, the decision of the Second Circuit undermines the warrant requirement of the Fourth Amendment by permitting law enforcement to arrange and perform searches without probable cause. In light of the Second Circuit's weakening of the protections of the Fourth Amendment, this Court should decide this issue of first impression.

I. The Decision of the Second Circuit Conflicts with the Holdings of Other Courts of Appeals

The decision of the Court of Appeals for the Second Circuit, holding that a law enforcement agency's use of probation officials to gain entrance to property and search such property when no probable cause exists upon which a warrant may be issued, is in direct conflict with decisions of other Courts of Appeals.

The Second Circuit held, *inter alia*, that this "stalking horse defense", recognized, established and followed in other Circuits, does not exist in the jurisdiction of the Second Circuit. This defense has existed in other Circuits as early as 1969, and has led to the suppression of evidence in circumstances identical to those involved in the cases herein. *See Smith v. Rhay*, 419 F.2d 160 (9th Cir. 1969) (holding that "a parole officer may not conduct a warrantless search of items in the parolee's possession while acting on the prior request of law enforcement officials and in concert with them" and suppressing evidence seized during a search initiated at the request of law enforcement).[2]

2. The facts in *Smith v. Rhay* are akin to those in this case, with the court suppressing evidence found in plain view when a parole officer initiated contact with the probationer at the sheriff's request in order to assist the sheriff with an investigation into probationer

(Cont'd)

The First, Third, Sixth, Eighth, Ninth and Tenth Circuits have all recognized and applied the principle that a law enforcement agency may not elicit assistance from probation officials to gain access to property for which it does not have probable cause for a warrant. The Ninth Circuit stated that a "probation officer acts as a stalking horse if he conducts a probation search on prior request of and in concert with law enforcement officers". *See United States v. Watts*, 67 F.3d 790, 794 (9th Cir. 1995), *rev'd on other grounds*, 519 U.S. 148, 117 S. Ct. 633, 136 L. Ed. 2d 554 (1997) (citing *United States v. Richardson*, 849 F.2d 439 (9th Cir.), *cert. denied*, 488 U.S. 866, 109 S. Ct. 171, 102 L. Ed. 2d 141 (1988) and *Smith v. Rhay*, 419 F.2d at 163-63). *See also United States v. Jarrad*, 754 F.2d 1451, 1454 (9th Cir. 1985) (stating that a parole officer may be a "stalking horse" if the police, instead of the parole officer, initiate the search), *cert. denied*, 477 U.S. 839, 106 S. Ct. 96, 88 L. Ed. 2d 78 (1985).

This principle has also been articulated and followed by the First Circuit, *see United States v. Cardona*, 903 F.2d 60, 65 (1st Cir. 1990) (stating that the "law will not allow a parole officer to serve as a cat's paw for the police"), *cert. denied*, 498 U.S. 1049, 111 S. Ct. 758, 112 L. Ed. 2d 778 (1991); *United States v. Giannetta*, 909 F.2d 571, 581 (1st Cir. 1990) (stating that "[c]ourts have uniformly held that probation and parole officers may not serve as 'stalking horses' for the police by initiating searches solely for police purposes in

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(Cont'd)

that was not based on probable case. *See* 419 F.2d 160, 162-63 (9th Cir. 1969). Therefore, if this Court recognized the defense as applied in the cases discussed *infra*, then the marijuana plants discovered in this case would be suppressed since they were discovered by a member of the DEA task force during a search initiated and directed by the DEA task force, in the presence of DEA task force members.

order to help police circumvent the fourth amendment's warrant requirements"), the Third Circuit, *see United States v. Hill*, 967 F.2d 902, 911 (3d Cir. 1992) (stating that the parole agents had not "'switched hats' and become 'stalking horses' for the police"), the Sixth Circuit, *see United States v. Martin*, 25 F.3d 293, 296 (6th Cir. 1994) (considering whether probation officer was "acting either at the direction of the police or as a 'stalking horse' to help the police evade the Fourth Amendment warrant requirement"), the Eighth Circuit, *see United States v. McFarland*, 116 F.3d 316, 318 (8th Cir. 1997) (holding that "a parole search is unlawful when it is nothing more than a ruse for a police investigation"), *cert. denied*, 522 U.S. 961, 118 S. Ct. 394, 139 L. Ed. 308 (1997) and the Tenth Circuit, *see United States v. McCarty*, 82 F.3d 943, 947 (10th Cir. 1996) (stating that it is "well established that a probation officer cannot act as a 'stalking horse' on behalf of police to assist police in evading the Fourth Amendment's warrant requirement"), *cert. denied*, 519 U.S. 903, 117 S. Ct. 257, 136 L. Ed. 183 (1996).

Despite this existing case law from other circuits, the Second Circuit held as follows on this issue:

> The District Court held that the "stalking horse" theory was inapplicable here because the probation officers were lawfully on the scene pursuant to a clear duty of visitation. The District Court thus relied on its view as to the likely parameters of the stalking horse theory. To decide this appeal on that ground, we would have to assume *arguendo* that this ill-defined theory exists and then decide whether its parameters exclude the facts presented in this case. Rather than hypothetically construct the theory and then limit

> the parameters of the hypothetical theory, we apply Occam's razor and decide that **the doctrine is not a valid defense in this Circuit**.

See 32a (emphasis added). In addition to the Second Circuit's clear departure from the law of the other circuits outlined above, the Second Circuit also illustrates the need for clarity on the elements and parameters of the defense, if it does legally exist under the Fourth Amendment. For both of these reasons, this Court should address this issue so as to: (1) definitively rule whether, under the Fourth Amendment, law enforcement agencies may use probation officers, and their authority, to gain access to and search property for which probable cause does not exist for the issuance of a warrant; and (2) define the elements of the stalking horse defense and its parameters.

II. The Decision of the Second Circuit Court of Appeals in This Case Limits the Warrant Requirement of the Fourth Amendment, and Therefore Requires Review By This Court.

This issue has not been addressed by this court, and is of such constitutional importance, that review and decision by this court is warranted. While this Court recently decided in *Knights v. United States* that a search of a probationer's apartment by a sheriff's detective was reasonable under the Fourth Amendment when the search was based on "reasonable suspicion", and the probationer had agreed, pursuant to his conditions of probation, to searches of his property and person by law enforcement officials without a warrant or reasonable cause, *see* 534 U.S. 112, 122 S. Ct. 5887, 151 L. Ed. 2d 497 (2001), this Court has not addressed the constitutionality of searches of a probationer's property initiated by, performed under the direction of, and with the

participation of, law enforcement officials who do not posses information sufficient to obtain a search warrant based on probable cause when that probationer has not consented to any searches of his property by law enforcement.

If a law enforcement agency may use probation officials as its agents in order to search the property of a probationer when it does not have information sufficient to obtain a search warrant, when the probationer has agreed to a condition of his supervised release that states, "[y]ou shall permit **a probation officer** to visit at any time at home or elsewhere and shall permit confiscation of any contraband observed in **plain view** by the **probation officer**", *see* 59a (emphasis added), then the warrant requirement of the Fourth Amendment, and the requirement of probable cause for a search, no longer applies to **any** individuals who are under the supervision of probation. A holding that such a search is permissible under the Fourth Amendment, such as the Second Circuit's decision in this case, necessarily undermines and nullifies the warrant requirement since, whether or not a probationer consents to searches by law enforcement officers as a condition of his supervision by probation, law enforcement officials may perform a search by simply asking probation officials if they will do a home visit, and having a probation official present for the search. *See United States v. Cardona*, 903 F.2d 60, 65 (1st Cir. 1990) (stating that "allowing police officers to act in an agentival capacity is not an open invitation to gamesmanship through which law enforcement personnel can circumvent the rigors of the fourth amendment"). *See also Smith v. Rhay*, 419 F.2d 160, 163 (9th Cir. 1969) (stating that to permit "concerted effort" between law enforcement and probation officials "to circumvent [probationer's] fourth amendment rights cannot be done"). No probable cause would be required whatsoever.

This is particularly true in this case since, not only did petitioner Reyes not consent to searches by law enforcement officials, he also only consented only to visits to his property by probation and the confiscation of "plain view" contraband. *See* 59a. Such limited consent clearly did not inform petitioner Reyes that law enforcement officials could organize searches of his property without probable cause, and that he, therefore, waived all protections of the Fourth Amendment.

Due to the constitutional impact of the Second Circuit's decision on all individuals under the supervision of probation in the Second Circuit, and the Second Circuit's implicit holding that since the "stalking horse" defense, as recognized in other Circuits as discussed at Point I, *infra*, does not exist in the Second Circuit, all individuals under the supervision of probation waive the protections of the Fourth Amendment, this Court should decide this question of first impression, and grant this petition.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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